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Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY

MM Docket No. 93-279

In the Matter of

Amendment of Section 73.202(b), RM-8368
Table of Allotments, RM-8385
FM Broadcast Stations.
(Cal-Nev-Ari, Boulder City and Las Vegas,
Nevada)¹

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 10, 1995;

Released: July 17, 1995

By the Chief, Allocations Branch:

1. At the request of Richard W. Myers ("Myers"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 7985 (1993), proposing the allotment of Channel 285A to Cal-Nev-Ari, Nevada, as its first local aural transmission service. Comments were filed by the petitioner reiterating his intention to apply for the channel, if allotted. Rock "N" Roll, Inc. ("RNR") filed a petition for

¹ The communities of Boulder City and Las Vegas have been added to the caption.

² RNR did not file its petition for rule making as a counterproposal in this proceeding. However, RNR's petition is timely filed to be considered as such and the requests are mutually exclusive. Boulder City and Cal-Nev-Ari are located approximately 79 kilometers apart while the Commission's rules specify a minimum distance separation of 106 kilometers for first adjacent Class A and Class C2 allotments. Therefore, in compliance with Commission policy, we have accepted RNR's petition as a counterproposal herein. Public Notice of the filing of the counterproposal was given on January 11, 1994, Report No. 1996.

³ After the record closed, Myers filed a "Petition for Leave to File" and "Supplemental Reply Comments" which RNR opposed. Myers objects to the fact that RNR did not file initial comments responsive to Myers' proposal but rather submitted its opposition as reply comments in response to the Commission's Public Notice accepting RNR's petition as a counterproposal herein. Myers argues that RNR's reply comments should be struck because he has effectively been precluded from responding to the issues raised in RNR's opposition. We will not strike RNR's reply comments or accept Myers' Supplemental Reply Comments. First, RNR filed its petition for rule making after adoption of the *Notice* in Cal-Nev-Ari but prior to its release to the public. Therefore, RNR had no official notification that a conflicting petition had been filed with the Commission until the issuance of the Public Notice accepting RNR's petition as a counterproposal herein. Therefore, RNR could not be expected to comment on Myers' proposal until responses were due in response to the counterproposal Public Notice. Further, although generally reply comments are for the purpose of responding to issues raised in initial comments, the Commis-

rule making requesting the modification of Boulder City, Nevada, Station KRRI's license to specify Channel 286C2, rather than its present Channel 288C2, and the modification of Las Vegas Station KRBO's license to specify Channel 289C2 rather than its present Channel 286C2.² Reply comments were filed by Myers, RNR and Patmor Broadcasting Group, Ltd. ("Patmor"), licensee of Station KRBO.³

2. RNR, licensee of Station KRRI, Channel 288C2, Boulder City, states that it is currently receiving interference from second-adjacent Station KRBO, Channel 286C2, Las Vegas, Nevada.⁴ It states that this interference occurs within its 1 mV/m as well as its 3.16 mV/m contour. RNR believes that this interference is exacerbated by the fact that the two stations are separated by only 400 kHz and believes that increasing the separation to 600 kHz may reduce or even eliminate the interference. RNR states that both channels can be allotted to their respective communities in compliance with the Commission's mileage separation requirements at each station's present transmitter site. Finally, stating that it is KRBO's responsibility to resolve the interference problem, it states that Station KRBO should reimburse RNR for the reasonable and prudent costs it will incur in making this frequency change.

3. In his petition for rule making, Myers provided information to show that Cal-Nev-Ari qualifies as a community for allotment purposes even though it is not listed in the U.S. Census or incorporated. However, the information provided was found to be insufficient to tentatively conclude that Cal-Nev-Ari is a community for allotment purposes. Therefore, the *Notice* requested that Myers provide specific information as to the social, economic, cultural and governmental indicia to support a finding that Cal-Nev-Ari is a community for allotment purposes.

sion has previously stated:

In issuing a Notice of Proposed Rule Making, the Commission generally provides a 15 day period for parties to file replies to initial comments. However, the Commission is aware that when a counterproposal is filed, the time between the announcement of the filing of counterproposal and the reply comment date may be less than 15 days. Thus, the Commission routinely extends the reply comment period to allow all interested parties adequate time in which to respond to the counterproposal. The Commission does not limit these responsive pleadings to parties other than the counterproponent nor the scope of the responses. Rather, it simply extends the filing period to allow all parties 15 days in which to file responsive pleadings.

See 2 FCC Rcd 3316 (1987). We also deny Myers' Motion to include Senator Reid's letter in the record. Senator Reid's letter was received at the Commission on January 6, 1994, after the date for filing initial comments but timely for consideration as a reply comments. However, because the letter was not served on the counterproponent, it constitutes a prohibited *ex parte* filing and cannot be considered herein.

⁴ RNR states that on October 29, 1993, it reported this interference to the Commission, requesting that the Commission order Station KRBO to take whatever steps might be necessary to eliminate this interference. By letter of March 24, 1994 (1800B3-DEB), the Audio Services Division, under delegated authority, denied RNR's informal objection and granted Station KRBO's license application.

4. In comments, Myers contends that the Commission's reliance on inclusion in the U.S. Census and incorporation in determining community status discriminates against rural areas in the western states where communities are just starting to develop. He states that Cal-Nev-Ari is geographically separate from any other community and thus is not part of any larger community. Further, he submits that a finding that Cal-Nev-Ari is not a community would "relegate its residents to living 'nowhere.'" In reviewing past cases, Myers states that the following elements appear to be important in determining community status: (1) a separate postmark; (2) receipts from local businesses that state the name of the community; (3) evidence that businesses are identified with and serve the community in question, not some other community or larger area; (4) listing in the Rand McNally Atlas and (5) testimony of local residents that they "function and conceive of themselves as residents of a community around which their interests coalesce."

5. Myers states that the petition noted the fact that Cal-Nev-Ari has its own post office and zip code and has local businesses that are identified with and serve Cal-Nev-Ari and not some other community or larger area, namely the Cal-Nev-Ari Casino. To provide the testimony of local residents, Myers appends a report detailing the findings of two sociologists who interviewed the residents of Cal-Nev-Ari to determine whether they function as a community. Myers claims that the report clearly demonstrates that the residents of Cal-Nev-Ari think of themselves as residents of a community.

6. Myers opposes RNR's petition to substitute channels at Boulder City and Las Vegas. He states that RNR seeks to substitute a third-adjacent channel for a second-adjacent channel in order to reduce or eliminate interference to Station KRRI's signal. Myers notes that the Boulder City and Las Vegas stations meet the required mileage separation requirements and thus receive all of the signal protection to which they are entitled. Finally, Myers submits that RNR's proposal does not provide for any new local transmission service or any increase in the coverage of an existing station. Therefore, RNR's proposal does not serve as high an allotment priority as the provision of a first local aural transmission service at Cal-Nev-Ari.

7. In reply comments, Myers again states that Cal-Nev-Ari has the requisite attributes to be considered a community for allotment purposes. He provides the U.S. Census Bureau's definition of a Census Designated Place ("CDP"), stating that the Commission relies heavily on such designations in determining community status. Noting that CDP's are limited to places of at least 1,000 population, Myers argues that if the Commission requires CDP status or political incorporation to justify an allotment, it means the Commission has determined that no unincorporated community of less than 1,000 population merits an allotment. He contends that such a "blanket decision would be arbitrary and irrational, and thus unlawful."

8. RNR, in reply comments, states that Myers has failed to provide information which demonstrates that Cal-Nev-Ari has social, economic, cultural or governmental indicia to qualify it as a "community" for allotment purposes. RNR points out that Cal-Nev-Ari has no schools, with the nearest elementary school in Searchlight and the nearest high school in Laughlin. Most people, according to RNR, subscribe to the *Las Vegas Review-Journal* for newspaper information, contending that not only is there no local newspaper, there is no need for a local source of local news. RNR acknowledges that there is a local volunteer

fire department but submits that its existence is due to the distance from other fire houses, not as an indication of community status. It also disagrees with Myers' contention that since Cal-Nev-Ari is not part of any other community it must thereby be considered as a separate community worthy of an FM allotment. RNR states that not everyone lives in a community as defined by the Commission, noting that people can and do live in rural areas without being a part of a defined community.

9. RNR states that the report of sociologists Victoria J. Evans and Donald E. Carns ("Evans/Carns") which Myers' appended to his comments, provides a "reasonably accurate" description of Cal-Nev-Ari. As described in the report, RNR states that Cal-Nev-Ari consists of a double row of mobile homes with an airstrip behind them on one side of the road. On the other side is a casino which also houses the post office, a gas station which is closed two days of the week, a laundromat, mobile homes, a motel, a market and RV park and a ranch. RNR goes on to state that it appears that the gas station, laundromat, RV park and market are part of, or affiliated with, the casino rather than separately owned and operated businesses. RNR notes that Cal-Nev-Ari has no churches, no regular social events or social clubs identified with Cal-Nev-Ari. Further, while Myers contends that the casino is the hub of social life in the area "with some residents spend[ing] their days drinking at the bar," RNR argues that community status is not demonstrated by "residents drinking at a bar." RNR goes on to state that Myers has failed to show any cultural cohesiveness in Cal-Nev-Ari. It points out that Myers acknowledges that many of Cal-Nev-Ari's residents stay in the area only as long as their jobs require it. Further, RNR submits that the fact that many of these people reside in recreational vehicles while in Cal-Nev-Ari clearly shows these residents consider themselves only to be visitors to the area, with no desire to make it a permanent residence. RNR also points out that, with the exception of US Route 95 which is maintained by the federal government, all of the area's roads are only dirt paths.

10. Finally, RNR states that even if the Commission were to find that Cal-Nev-Ari is a community for allotment purposes, the public interest would be better served by the substitution of channels at Boulder City and Las Vegas since it would alleviate a "serious" reception problem by an existing station, a problem not anticipated by the Commission when it allotted Channel 286C2 to Las Vegas. RNR disputes Myers' stand that as long as the mileage separation standards are met, no further protection from interference can be obtained. It argues that Station KRRI's listeners, although outside its community of license, are entitled to interference-free reception. To this end, it states that the Commission required a number of FM stations in the Minneapolis-St. Paul area to reduce power due to interference with the reception of other area stations. Finally, RNR again states that Station KRBO should be required to pay all costs associated with the change of channel but, if required by the Commission, states its willingness to pay the reasonable and prudent costs incurred by Station KRBO in changing its channel.

11. Patmor argues that RNR's "extraordinary" request must be denied. It submits that where stations are fully spaced and no new service is provided, there is no reason for the Commission to juggle allotments simply because a licensee believes that it would improve service within its computed service area. Further, although RNR's proposal may increase the spacing between Stations KRRI and

KRBO, Patmor points out that Station KRBO would become closely spaced to Station KRCY(FM), which operates on first adjacent Channel 290C1 at Kingman, Arizona. Patmor questions whether the Commission would then reallocate channels if Station KRBO's new signal affected the reception of Station KRCY(FM), assuming a new allotment could be found. Conversely, if Station KRBO found that Station KRCY(FM)'s signal adversely affected reception of its station, could it request a further rule making to again acquire the right to operate on its initial channel? Thus, Patmor states that RNR's proposal could create a "domino" effect in this and other cases, which would then nullify the Commission's reliance on channel spacing, rather than actual levels of interference, in determining channel allotments. Finally, it argues that RNR's request that Patmor bear the cost of modifying both station's operating channel is inconsistent with Commission policy and precedent, citing *Circleville, Ohio*, 8 FCC 2d 159, 9 RR 2d 1579 (1967). Patmor states that RNR's claim that KRBO is to blame for creating interference to KRRI and thus must cure the interference is "fatuous." No station, according to Patmor, is guaranteed interference-free reception throughout its computed service area. It submits that the spacing regulations represent general, statistical probabilities. Thus, it contends that no permittee/licensee may be required to pay for the modification of any station's facilities if interference actually occurs in a given situation. Finally, Patmor submits that if there is any "fault" in this case, it is RNR's refusal to accept that under the Commission's FM allocation policies, distance, terrain, buildings and an adverse electrical environment, which includes the authorized operations of other stations, may affect a listener's ability to receive Station KRRI's signal, regardless of the extent of the theoretical coverage computed by the station.

DISCUSSION

12. After reviewing the proposals before us, we find that neither proposal can be granted consistent with Commission policy and precedent. First, based upon the showing submitted by Myers, we do not believe that Cal-Nev-Ari is a community for allotment purposes. The Commission's long-standing policy is to require that allotments be made to communities composed of geographically identifiable population groupings. This requirement is generally satisfied if the proposed community is either incorporated or listed in the U.S. Census. Although the 1995 Edition of the *Rand McNally Commercial Atlas* lists Cal-Nev-Ari with a population of 350 persons, it is neither incorporated nor listed in the U.S. Census. Further, the Commission has stated that mere geographical location is not sufficient to establish "community status." See *Vinville, Mississippi*, 48 FR 5974 (1983), and *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991). Contrary to Myers' assertion, FM allotments are not limited to communities which are either incorporated or listed in the U.S. Census. See *Gleneden Beach, Oregon*, 3 FCC Rcd 6464 (1988), *Eagle Nest-Angel Fire, New Mexico*, 3 FCC Rcd 2520 (1988), and *Laughlin, Nevada*, 2 FCC Rcd §6267 (1987). Such a designation only gives rise to the presumption of community status, a presumption which can be rebutted. See *Hannahs Mill and Milledgeville, Georgia*, 7 FCC Rcd 3944 (1992).

13. In this case, we find that Myers has not provided information sufficient to overcome the Commission's initial finding that Cal-Nev-Ari does not meet the qualifications of a community for allotment purposes. Rather, based

on the information provided, it appears that Cal-Nev-Ari is an isolated population pocket where residents feel a kinship with one another and provide assistance whenever possible and necessary. For example, we are told that when an emergency occurs, the bartender, through the use of beepers, sends out a signal and whoever shows up first drives the ambulance or fire truck or does whatever is needed. Comments of Richard Myers, Appendix, page 11. While this leads us to believe that there is indeed a general spirit of humanity and cooperation among the residents, it does not rise to the level of a community for allotment purposes. Cal-Nev-Ari has no local government or any direct governmental impact, and no community organizations such as a Chamber of Commerce, Rotary Club or Lions Club. We deem the lack of any civic or social organizations or religious institutions to be significant in determining whether Cal-Nev-Ari has the indicia of a community. Communities demonstrate the fact that residents share common interests by the formation of community-based organizations and religious institutions. See *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments (Semora, North Carolina)*, 5 FCC Rcd 934 (1990). Moreover, the only business is the Cal-Nev-Ari Casino, owned by Ms. Nancy Kidwell, who also owns and operates the coffee shop, mobile home park, RV park, service station, laundromat, market, airport, water and sewer service. In addition, the remaining salable land is owned by Ms. Kidwell. There are no locally maintained roads and police service is provided by Clark County. According to Myers, municipal concerns are decided by the Clark County Commissioners without input from residents of Cal-Nev-Ari, and the only community meetings held in Cal-Nev-Ari concern the running of the volunteer fire department. We note that while the residents of Cal-Nev-Ari built the fire house, both the fire truck and ambulance were provided by County grants.

14. Next, RNR seeks the substitution of channels at Boulder City and Las Vegas and the modification of the licenses of Stations KRRI and KRBO to specify alternate channels in an attempt to resolve interference to the reception of its station. RNR does not dispute that the two stations are properly separated according to the minimum distance separations set forth in Section 73.207 of the Commission's Rules or that Station KRBO is operating with only the powers authorized in its construction permit and license. Nevertheless, it contends that interference occurs that is unacceptable because it occurs within Station KRRI's predicted 60 dBu and 70 dBu contours.

15. Whether or not Station KRRI may be experiencing interference within these contours, the Commission has consistently held that stations are entitled only to that interference protection which accrues from stations operating at properly spaced separations and with authorized powers. Section 73.209 of the Commission's Rules states:

Permittees and licensees of FM broadcast stations are not protected from any interference which may be caused by the grant of a new station, or of authority to modify the facilities of an existing station, in accordance with the provisions of this subpart. . . . The nature and extent of the protection from interference afforded FM broadcast stations operating on Channels 221-300 is limited to that which results when assignments are made in accordance with the rules in this subpart.

See also *Vancouver, Washington; Coos Bay and Corvallis, Oregon*, 4 FCC Rcd 839 (1989). See also *Morehead City, North Carolina*, 50 FR 33546, August 20, 1985, *recon. den.*, 2 FCC Rcd 4146 (1987), *aff'd WITN-TV, Inc. v. FCC*, 849 F.2d 1521 (D.C. Cir. 1988). RNR is correct that the Commission at one time ordered the Minneapolis-St. Paul stations to reduce power to alleviate interference problems. However, the circumstances which led to that decision are not present in this case. The interference being received by the Minneapolis-St. Paul stations was third order intermodulation, that is, one station's signal mixed with a second station's signal which in turn caused interference to a third station. We note that the problem has now been resolved by the stations moving their transmitters to an antenna farm and the stations have ceased reduced-power operation. Here, the interference complained of is caused by contour overlap, not intermodulation, and thus is governed by Section 73.209 of the Commission's rules. The Commission has, in the past, recognized that mileage separation requirements, as opposed to contour protection, sometimes overprotect or underprotect other adjacent channel stations. See *Amendment of Part 73 of the Commission's Rules to Permit Short-spaced FM Station Assignments by Using Directional Antennas*, 4 FCC Rcd 1681, 1685 (1989), *recon. den.*, 6 FCC Rcd 5356, 5358 (1991). As noted in the Commission's letter of March 23, 1994 (1800B3-DEB), which denied RNR's opposition to the grant of Station KRBO's license, the interference complained of is the result of lower terrain between the two stations which causes each station's 60 dBu protected and 80 dBu interfering contours to be significantly extended. Further, as stated in the March, 1994, letter, the Commission does not attempt to resolve this type of interference beyond ensuring that the required mileage separations are met, or if waived, that the signal is reduced sufficiently to provide the same level of interference protection that would be provided if the stations were properly separated. RNR has provided no case where the Commission has ordered a station to change channel to end or ease contour overlap interference such as it states Station KRRI is experiencing.

16. Accordingly, IT IS ORDERED, That the petition for rule making filed by Richard W. Myers (RM-8368) to allot Channel 285A to Cal-Nev-Ari, Nevada, IS DENIED.

17. IT IS FURTHER ORDERED, That the petition for rule making filed by Rock "N" Roll, Inc. (RM-8385), to substitute Channel 286C2 for Channel 288C2 at Boulder City, Nevada, substitute Channel 289C2 for Channel 286C2 at Las Vegas, Nevada, and modify the licenses of Stations KRRI and KRBO, respectively, IS DENIED.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

19. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
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Mass Media Bureau